DR CLARENCE EDWIN & ANOR A

v.

HARTA KUMPULAN SDN BHD & ANOR

HIGH COURT MALAYA, JOHOR BAHRU B
GUNALAN MUNIANDY JC
[CIVIL SUIT NO: 22-905-2007]
5 MAY 2011

EVIDENCE: *Privilege - Solicitor - Client privilege - Evidence Act 1950, s. 126 - Letter containing libelous statements against advocate and solicitor - Letters addressed to solicitors and copied to third parties - Open letters that could be read by anyone - Whether communication entailed seeking or giving of legal advice - Whether solicitor-client privilege could arise* C

TORT: *Defamation - Damages - Aggravated damages - Awarded where defendant aggravated injury already caused to plaintiff - Defendant continuing to publish libelous letters against plaintiff even after issuance of writ - Whether malicious motive established* D

TORT: *Defamation - Damages - Assessment - Whether prove of actual damage required - Defendant's conduct to be assessed - Failure to retract libel or apologise - Whether clear intention to adversely affect plaintiff's earnings* E

TORT: *Defamation - Defences - Fair comment - Letter containing libelous statements against advocate and solicitor - Whether fair comment in public interest - Whether defendant actuated by deep malice* F

TORT: *Defamation - Libel - Letter containing libelous statements against advocate and solicitor - Whether elements of defamation established - Plaintiff labelled criminal without any justification - Whether fair comment in public interest - Whether defendant actuated by deep malice* G

The first plaintiff (P1) (an advocate and solicitor) was in the employment of the second plaintiff (P2). The plaintiffs commenced this libel suit against the defendants arising out of defamatory H
words alleged to have been published by the latter to various parties. P2 discontinued the claim leaving only the claim of P1 to be tried. At the material time, the first defendant (D1) was a private limited company in Johor Bahru carrying on the business of property investors and developers while the second defendant I

(D2) was one of its directors. The defamatory statements came about as a result of the outcome of a High Court civil suit where D1 in this case was the plaintiff and the defendant was IJM Corporation Bhd (IJM) which was represented by P1. According to P1, the defendants' antagonistic and hostile attitude towards him simply because he represented IJM in most of its suits against D1 was manifested in the widely published libelous statements against him beginning with the letter dated 30 September 2006. This and all the subsequent letters were authorised and signed by D2, which continued well after D1 had been wound up. The defamatory words which were the subject-matter of the instant claim were contained in a letter dated 11 June 2007. It concerned P1's conduct as IJM's counsel in filing an application to set aside the High Court suit brought by D1 against IJM and went on to launch a barrage of personal attacks against P1, imputing to him, *inter alia*, contempt of the Appeal Court; infringement of legal provisions with wilful intent; obstruction and frustration of judicial proceedings; conspiracy in assisting to abet cheating D1 and malicious and vindictive conduct. It was alleged that the impugned words in the letter so far as they related to P1, in their natural and ordinary meaning, were understood to mean that: (i) he was unfit to be an advocate and solicitor; (ii) he was unprofessional, malicious, vindictive and lacked integrity; (iii) he was a liar, cheat and has committed deception; and (iv) he had committed an offence punishable under the Penal Code. The said letter was addressed to a legal firm by the name M/s Tan Cheng Yaw & Co to the attention of one Mr J Jayaperakash as well as copied to several other parties, including the Senior Assistant Registrar, High Court Kuala Lumpur.

Held (allowing the plaintiff's claim with costs):

(1) The defendants neither challenged the evidence of P1 nor put their case to him to enable him to provide a reply. P1's unchallenged and uncontradicted evidence must be deemed to have been accepted by the defence. Likewise, when D2 declined the right to cross-examine P1 and put the defence case to him, he must be deemed to have abandoned their pleaded defence against the allegation in the statement of claim; *Wong Swee Chin v. PP,* (refd); *Aik Meng (M) Sdn Bhd v. Chang Ching Chuen* (refd). (para 2)

(2) D2 admitted authoring and signing the letter as well as its *vide* publication. The letter, in a sweeping and blatant manner, made grave allegations touching on the character of P1, without any factual basis being shown. That the writer (D2) was actuated by deep malice in writing the letter spoke for itself. D2 himself admitted malice towards P1 as being the reason for lodging a police report against him. Moreover, the deliberate publication to a variety of persons seemed calculated to cause optimum damage to P1's reputation. D2 seemed bent on publishing the malicious words to all and sundry in blatant disregard of subsisting injunctions prohibiting him from doing so. (para 18)

(3) For a cause of action in libel to succeed, the 3 vital ingredients that need to be established are that: (i) the impugned statements are libelous; (ii) the statements refer to the plaintiff; and (iii) there was publication of the statements. The impugned statements made against P1 were capable of being defamatory and indeed bore defamatory imputations against him. The impugned letter signed by D2 had cast direct aspersions on P1's conduct as counsel for IJM. That the impugned words were targeted at him was beyond doubt as his name was expressly mentioned. It was, thus, a case of direct libel and not in the form of innuendo or by implication. (para 20)

(4) Fair comment would fail as a defence for libel if malice on the part of the defendant – the writer of the impugned words – was shown. Apart from D2 himself having admitted malice towards P1, malice on the defendants' part was plainly explicit from D2's conduct and the contents of the series of letters he had written, born out of what appeared to be a bitter grudge against P1. The clear malicious intention in publishing the words complained of, *ipso facto*, defeated the pleaded defence of fair comment. (para 22)

(5) Though the letters were addressed to the defendants' solicitors, the same were copied to third parties. As there was publication to third parties, the question of solicitor – client privilege under s. 126 of the Evidence Act 1950 did not arise at all. Neither was any confidentiality involved as they were open letters that could be read by anyone coming into contact

with them. Further, where the communication does not entail seeking or giving of legal advice, the said privilege has no application; *Ernest Cheong Yong Hin v. Kamariyah Hamdan & Ors.* (refd). (para 33)

(6) In assessing damages for defamation, the defendant's conduct at the various relevant stages – before and after the impugned act or statement – until culmination of the trial may be taken into consideration. Despite the plaintiffs' solicitors issuing a formal demand for retraction of the libel and apology, the defendants failed or refused to do so, even after an injunction was obtained to restrain them from perpetrating the libel. A continuous flow of letters of a similar nature went on for no less than three years. The publications, even after issuance of the writ, could be considered as far as aggravated damages were concerned. (para 41)

[General damages of RM750,000 and aggravated damages of RM1,000,000 was awarded to the plaintiff.]

Case(s) referred to:

Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***
Campbell v. Spottiswoode [1863] 3 B & S 769 ***(refd)***
Chok Foo Choo v. The China Press Bhd [1999] 1 CLJ 461 CA ***(refd)***
Hebditch v. Macllwaine [1894] 2 QB 58 ***(refd)***
Ernest Cheong Yong Yin v. Kamariyah Hamdan & Ors [2010] 1 LNS 1164; [2011] 10 CLJ 172 HC ***(refd)***
McCarey v. Associated Newspapers [1965] 2 QB 86 ***(refd)***
Palmer v. Boyer [1954] Cro Eliz 324 ***(refd)***
Parmiter v. Coupland [1840] 6 M & W 105 ***(refd)***
Peard v. Jones [1635] Cro Car 382 ***(refd)***
Pearson v. Lemaitre [1843] 5 Man & G 700 ***(refd)***
Praed v. Graham [1889] QBD 53 ***(refd)***
Pullman v. Hill [1891] 1 QB 524 ***(refd)***
R v. Flowers [1880] 44 JD 377 ***(refd)***
Rajagopal v. Rajan [1971] 1 LNS 117 FC ***(refd)***
Ratcliffe v. Evans [1892] 2 QB 524 ***(refd)***
Rookes v. Barnard [1964] AC 1129 ***(refd)***
Sim v. Stretch [1936] 52 TLR 669 ***(refd)***
Solosky v. The Queen [1980] 1 SCR 521 ***(refd)***
Sutherland v. Stopes [1925] AC 47 ***(refd)***
Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors [1995] 1 LNS 304 HC ***(refd)***
Villiers v. Morsley [1769] 2 Wilson 403 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218
Evidence Act 1950, s. 126
Income Tax Act 1967, s. 114(1)
Rules of the High Court 1980, O. 78 r. 3(2)

For the 1st plaintiff - R Param; M/s Clarence Edwin Law Offices
For the 1st defendant - Department of Insolvency, Malaysia
For the 2nd defendant - In person

Reported by Amutha Suppayah

JUDGMENT

Gunalan Muniandy JC:

[1] This is a suit for libel instituted by both the first plaintiffs, the 1st plaintiff (P1) being on advocate and solicitor and the second plaintiff (P2) being the legal firm in which he was then practising, against the defendants arising out of defamatory words alleged to have been published by the latter to various parties. The second plaintiff has since discontinued the claim against both defendants leaving only the claim of P1 to be tried. At the material time, the first defendant (D1) was a private limited company in Johor Bahru carrying on the business of property investors and developers while the second defendant (D2) was one of its directors. The defamatory statements came about as a result of the outcome of a Kuala Lumpur High Court civil suit where D1 in this case was the plaintiff and the defendant was IJM Corporation Bhd (IJM) which was represented by P1 under the employ of P2.

Evidence Of The First Plaintiff

[2] P1 sought to set out the facts to establish his case against D1 and D2 through his own evidence as the only witness (PW1). D2, who appeared in person and also represented D1 as its director, declined to cross-examine PW1 saying that his counsel was not present and that PW1 was a 'criminal' against whom he had lodged a police report. The defendants, thus, neither challenged the evidence of PW1 nor put their case to him to enable him to provide a reply. The law is well established on the

effect of a party's failure to challenge essential parts of the opposing party's evidence, what more where the only witness for that party is not cross-examined. The principle is equally applicable to civil and criminal proceedings.

[3] In *Wong Swee Chin v. PP* [1980] 1 LNS 138 Raja Azlan Shah, CJ (as HRH then was) held:

> On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as is common with all general rules there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v. Garry* [1973] 1 NZLR 120, 122 where Haslam J, said at page 122:
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> > In *Phipson on Evidence* 11th edition paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness's testimony, *viz*, where '... the story is itself of an incredible or romancing character, or the abstention arises from mere motives of delicacy ... or when counsel indicates that he is merely abstaining for convenience, e.g., to save time. And where several witnesses are called to the same point it is not always necessary to cross-examine them all.

[4] On the need for a party's case to be expressly put to the opponent's material witnesses, the principle was explained in the Court of Appeal case of *Aik Ming (M) Sdn Bhd & 8 Ors v. Chang Ching Chuen & 3 Ors & Another Case* [1995] 3 CLJ 639 where Gopal Sri Ram, JCA (as he then was) held:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

[5] Bearing these cardinal principles in mind, PW1's unchallenged and uncontradicted evidence, must be deemed to have been accepted by the defence. Likewise, when D2 declined the right to cross-examine PW1 and put the defence case to him, they must be deemed to have abandoned their pleaded defence against the allegation in the statement of claim ('SOC').

Factual Background

[6] In order to appreciate the apparent cause of the long series of derogatory statements made by D1 and D2 against the plaintiffs, it would be useful to examine the factual matrix of this case. It would go to show the motive and intent, especially of D2, for the incessant and malicious attacks complained of, particularly against P1.

[7] P1 had at that time about 14 years' standing as an advocate and solicitor and employed as a managing partner of Messrs Zaid Ibrahim & Co, a foremost legal firm said to be the country's largest. Sometime in 2008, after this suit was filed, he left the firm and commenced his own legal practice under the name of Clarence Edwin Law Offices in Johor Bahru. PW1 has also made a name for himself in legal publications and for participation in various bodies, the details of which can be found in his witness statement.

[8] The problems between IJM and the defendants had their genesis from a Joint Development Agreement ('JDA') between the parties for the construction of a condominium comprising 38 parcels on two pieces of land belonging to D1. P1 was then the solicitor acting for IJM. Under the contractual terms, 27 of the 38 parcels belonged to IJM while the remaining 11 were to go to D1. Of the 27 units, D1 managed to sell 22 units and upon issuance of strata titles, IJM requested D1 to transfer the five unsold units to them but D1 refused to do so. D2, the major shareholder and managing director of D1, was wholly in charge of the dealings with IJM. The refusal was purportedly on the ground that IJM's claim for the five units was barred by limitation and that IJM was required to pay D1's tax liability arising out of transfer of the units to IJM. A meeting was then held at Messrs Zaid Ibrahim (D2)'s office between IJM's representative and D2 to resolve the matter amicably but the attempt failed, said to be due to D2's confrontational attitude.

[9] On P1's advice, IJM filed a suit through P2 against the defendants for specific performance. The matter was initially handled by P1 who then passed it to a colleague from the same firm. On 1 February 2005, IJM obtained summary judgment from

the High Court against D1 where specific performance was ordered compelling them to transfer the five parcels to IJM together with an order for damages to be assessed, costs and interest. D1's appeal to the Court of Appeal was dismissed on 21 November 2006.

[10] Following the above decision, P1's colleague prepared the necessary forms for transfer of the five units to IJM, to be executed. After the transfer, however, D1 issued to IJM an invoice for RM284 million representing 'consideration' payable to them in respect of the sale of the five parcels to IJM who naturally disputed the claim as the High Court had adjudged the properties to belong to them. Despite this, D1 proceeded to serve a statutory demand notice under s. 218 of the Companies Act 1965 and threatened to file a winding-up petition against IJM. Again, on PW1's advice, IJM applied for an injunction to restrain D1 from presenting the threatened petition and sending incessant letters. As regards the latter, P1 advised that the tort of nuisance would lie against D1. Through the writ and cause papers filed by P2, PW1 succeeded in obtaining the two interlocutory injunctions sought against defendants.

[11] D1 then filed two civil suits against IJM, in the High Courts at KL and JB respectively, to claim for the said sum of RM2.84 million and other reliefs. Both suits were in due course dismissed with costs. IJM then applied for summary judgment in their suit which was granted on 18 January 2007, making the aforesaid interlocutory injunctions permanent. Costs were ordered to be paid by D1 to IJM. D1's appeals to the Court of Appeal have been dismissed. After having the bill of costs prepared by P1 taxed, IJM served a statutory demand on D1 to recover the taxed costs.

[12] On D1's failure to accede to the demand, IJM instructed P2 to file a winding-up petition against D1 for being unable to pay its debts, which was prepared and filed by P1's partner. Meanwhile, D1's application to review the taxed costs was dismissed by the taxing master.

[13] For being in breach of the injunction restraining D1 from communicating with IJM despite being warned not to do so, IJM applied for leave to commit D1's directors for contempt. Leave was granted and on a motion filed thereafter, the High Court found D1 guilty of contempt of court. D2, as director of D1, was sentenced to 14 days' imprisonment.

[14] P1 then left P2 to set up his own legal firm, Messrs Clarence Edwin Law Offices. On IJM's request, he agreed to assume conduct over all cases involving the defendants hitherto handled by P2. The authority to act and transfer of files to P1's firm were supported by IJM's board resolution. P1 pursued the said winding-up petition against D1 which the High Court granted on 19 November 2008. D1's appeal to the Court of Appeal against the winding-up order was struck out on 4 March 2011.

[15] D1's appeal to the Court of Appeal against the contempt of court conviction failed. The conviction was upheld but the custodial sentence was set aside on D2's undertaking not to commit any further breach of the injunction. On 25 November 2010, D1 was found guilty of a second breach of the injunction and D2 as director was sentenced to 30 days' imprisonment.

[16] According to PW1, the defendants' antagonistic and hostile attitude towards him simply because he represented IJM in most of its suits against D1 was manifested in the widely published libellous statements against him beginning with the letter dated 30 September 2006 as per para. 13(i) of the SOC. This and all the subsequent letters were authorised and signed by D2, which continued well after D1 had been wound up.

[17] The defamatory words which are the subject-matter of the instant claim are contained in a letter dated 11 June 2007, captioned "Suit No. S3-22-683-2006 (High Court Kuala Lumpur)" between D1 (plaintiff) and IJM (defendant). (See para. 5, SOC). It concerns P1's conduct as IJM's counsel in filing an application to set aside a High Court suit brought by D1 against IJM and goes on to launch a barrage of personal attacks against P1, imputing to him, *inter alia*, contempt of the Appeal Court; infringement of legal provisions with wilful intent; obstruction and frustration of judicial proceedings; conspiracy in assisting to abet cheating D1 of RM284 million; and malicious and vindictive conduct. It was alleged that the impugned words in the letter so far as they relate to P1, in their natural and ordinary meaning, were understood to mean that:

A (i) He is unfit to be an Advocate and Solicitor of the High Court of Malaya;

(ii) He is unprofessional, malicious, vindictive and lacks integrity;

(iii) He is a liar, cheat and has committed deception; and

B (iv) He has committed an offence punishable under the Penal Code.

[18] The said letter was addressed to a legal firm by the name Messrs Tan Cheng Yaw & Co to the attention of one C Mr J Jayaperakash as well as copied to several other parties, starting with the Senior Assistant Registrar, High Court Kuala Lumpur. (See para. 8 SOC). D2 admitted authoring and signing this letter as well as its *vide* publication as pleaded. There was no doubt at all that the letter, in a sweeping and blatant manner, D makes grave allegations touching on the character of P1, without any factual basis being shown. That the writer (D2) was actuated by deep malice in writing the letter speaks for itself. In fact, D2 (DW1) himself readily admitted malice towards P1 as being the reason for lodging a police report against him. This seemed to be E justification for calling P1 an accused criminal at every turn before and during the trial. His malice was manifestly clear from his all-round conduct which is illustrated in the evidence of PW2, an advocate and solicitor, who was approached by P1 before testifying. DW1 didn't miss the opportunity to discredit and F defame P1. Moreover, the deliberate publication to a variety of persons seemed calculated to cause optimum damage to P1's reputation. He seemed bent on publishing the malicious words to all and sundry in blatant disregard of subsisting injunctions prohibiting him from doing so.

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The Law On Libel

[19] While it is plain and obvious, from the unchallenged evidence of PW1, that DW1 had written libellous statements against PW1, H it would be noteworthy to state briefly what in law constitutes libel. The time-honoured principle is that "any imputation which may tend to lower the estimation of right thinking members of society generally or to cut him off from society or to expose him to hatred, contempt or ridicule is defamatory" of a person. (See I *Sim v. Stretch* [1936] 52 TLR 669; *Villiers v. Morsley* [1769] 2

Wilson 403; and *Parmiter v. Coupland* [1840] 6 M & W 105). The same principle was expressed in a local case, *Tun Datuk Patinggi Hj Abdul-Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304 on the test to be applied as follows:

> The test whether the words complained of in the article were capable of being, and were in fact, defamatory of the plaintiff was, whether such words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower him in the estimation of right-thinking members of society generally. The words complained of in the article were capable of being, and were in fact, defamatory of the plaintiff (see pp 402H and 403C); *JB Jeyaretnam v. Goh Chok Tong* [1985] 1 MLJ 334 and *Syed Husin Ali v. Sharikat Pencetakan Utusan Melayu Bhd & Anor* [1973] 2 MLJ 56 followed.

[20] From the authorities, it is settled that for a cause of action in libel to succeed, the three vital ingredients that need to be established are that:

(i) the impugned statements are libellous;

(ii) the statements refer to the plaintiff; and

(iii) there was publication of the statements.

[21] In *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461, the Court of Appeal (at p. 466, para. F) held:

> It cannot, I think, be doubted that the first task of a court, in an action for defamation, is to determine whether the words complained of are capable of bearing a defamatory meaning.

[22] In this case, there was no doubt at all that the impugned statements made against P1 were capable of being defamatory and indeed bore defamatory imputations against him. P/C referred to a string of authorities on the kinds of words that are considered defamatory of an advocate and solicitor. Amongst others, it is libellous and actionable without proof of special damage to impute to the plaintiff the commission of a crime, the acts of cheating, conspiracy, corruption, etc or abetment in the commission of a crime. Similarly, which is highly relevant to the present facts, it is actionable without proof of special damage to impute to charge an advocate and solicitor with having been guilty of corrupt,

dishonest or improper practice in the course of his profession. (*Palmer v. Boyer* [1954] Cro Eliz 324; *Peard v. Jones* [1635] Cro Car 382). This is exactly what D1 had done in the impugned letter signed by D2 which cast direct aspersions on P1's conduct as counsel for IJM. One can easily conclude that the words used were *prima facie* libelous against P1 in their natural and ordinary meaning.

[23] That the impugned words were targeted at him was beyond doubt as his name was expressly mentioned. It was, thus, a case of direct libel and not in the form of innuendo or by implication.

[24] It is trite that publication of the libel and not the libel itself that is the hallmark of a cause of action in libel Lord Esher MR in *Hebditch v. Macllwaine* [1894] 2 QB 58. In *Pullman v. Hill* [1891] 1 QB 524, Lord Esher MR defined publication as:

> The making known the defamatory matter, after it has been written, to some person other than the person of whom it is written. If the statement is sent straight to the person of whom it is written there is no publication of it.

[25] As the defendants not only addressed letters that they wrote containing the defamatory imputations against P1 to the said solicitors but also sent them to third parties and carbon-copied them to several others, the essential ingredient of publication was firmly established. This fact was neither denied nor disputed by DW1. Hence, as argued by P/C, the general rule that when a letter is addressed to a particular person, the writer is not responsible except for publication to that person has no application to the present facts. Further, the defendants ought to have known that the letters must have in the ordinary course of things, been read by many others before or after reaching the hands of the addressees. There was thus present, the likelihood of the publication not being confined to just the addressees or those to whom the letters were carbon-copied but being widespread.

The Pleaded Defence

[26] The defendants have averred that the alleged defamatory statements "consist of statements of fact that are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comment" in that "five copies of the Form

14A have been forwarded to the 2nd plaintiff and is within the knowledge of 1st plaintiff" and more importantly that "the said facts are of matter of public interest in that the 2nd defendant is avoiding payment of tax and may also have infringed s. 114(1) of the Income Tax Act 1967 ('ITA')".

[27] Merely pleading that the words complained of are in substance and in fact true on a matter of public interest is certainly insufficient. Particulars must be provided in support of the plea to comply with the mandatory requirement under O. 78 r. 3(2) of the Rules of the High Court 1980 that states:

> Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

[28] Even if the above mandatory requirement can be disregarded in respect of DW1, who was unrepresented, it is crucial to bear in mind the parameters of the defence of fair comment. Firstly, it is important to distinguish between a comment, which is a statement of opinion on facts (*R v. Flowers* [1880] 44 JD 377) and a libelous statement or allegation of fact which is neither a comment nor criticism of anything. The defence of fair comment will not apply to justify allegations of fact which cannot be proven to be true. Similarly, imputations of corrupt on dishonourable motives are not covered unless there is honest belief in the truth of the statements and foundation for the belief. The principle is explained in *Campbell v. Spottiswoode* [1863] 3 B & S 769 by Lockburn CJ. As follows:

> One man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid or wicked motives, unless there is so much ground for the imputation, that a jury shall find not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation.

[29] A perusal of the statement of defence would show that the allegations against PW1 stem from a dispute surrounding transfer of five parcels of land to IJM from D1 pursuant to a court order

of specific performance which purportedly exposed D1 to tax liability without having received any consideration. The plaintiff's counsel ('P/C') pointed out that the pleading in this respect relates in its entirety to issues wholly between IJM and D1 only without any involvement of PW1. The plea that the transfer forms sent to P2 were within PW1's knowledge was incorrect as the suit for specific performance, though initially handled by PW1, was subsequently taken over by his colleague, Mr Khoo Kay Ping ('KKP') who was based in Penang whereas PW1 practised in Johor. It was KKP who successfully obtained summary judgment for specific performance in that case and arranged for the transfer forms for the five parcels to be executed in favour of IJM pursuant to the court order. In the circumstances, there was no basis whatsoever for defendants to make the allegations against P1 (See exh. P3) on the pretext as pleaded that the said transfer was within his knowledge. Even if he had such knowledge, no justification was shown for making the libellous statements as per the letter referred to in para. 6 of the SOC. The statements imputing contempt of court, infringement of law, cheating, conspiracy, etc to P1 arising out of the transfer were patently pure allegations of fact and certainly not expressions of opinion to qualify as comment. There was, thus, no question of whether the statements were fair comment. Quite apart from this, DW1 in his testimony failed to produce even an iota of evidence to prove the truth of any one of the said allegations, each and every one of which had to be supported by evidence to merit any kind of consideration.

[30] Equally important to note is that fair comment would fail as a defence for libel if malice on the part of the defendant – the writer of the impugned words – is shown. (See *Rajagopal v. Rajan* [1971] 1 LNS 117 where *Sutherland v. Stopes* [1925] AC 47 per Viscount Finlay was followed). Apart from DW1 himself having admitted malice towards P1, malice on the defendants' part was plainly explicit from DW1's conduct and the contents of the series of letters he had written, born out of what appeared to be a bitter grudge against P1 for his role as counsel to IJM in the suits against D1. The clear malicious intention in publishing the words complained of, *ipso facto*, defeated the pleaded defence of fair comment.

[31] Coming now to the issue of public interest which was pleaded in the defence in relation to collection of income tax and invoked by DW1 in his testimony to justify his actions, the stance was that the libel was published to various parties in order to protect the public interest. DW1 claimed that it was to prevent evasion of income tax payment in respect of the transfer of land to IJM. The claim was, in my view, completely unfounded as the element of income tax, as decided in several suits, had no application in the dispute between IJM and D1 as the transfer of five parcels to IJM was pursuant to a court order based on IJM being found to be the rightful owners. It was incomprehensible how the issue of tax payable by D1 could arise in a court directed transfer as was expressly held in Johor Bahru Civil Suit No. 22-458-2003 (judgment of Syed Ahmad Helmy J). P/C informed the court that DW1 canvassed the same defence in the committal proceedings initiated in this action against him before YA Zakiah binti Kassim JC but the court in convicting and sentencing him for contempt rejected the defence. P/C contented that in the light of these rulings and inaction by the tax regulatory bodies against IJM or P1 despite the numerous complaints against them by DW1 should have convinced him that tax was a non-issue in this dispute. Yet, he did not desist from proceeding on the libellous path.

[32] It was also amply clear that the libellous statements were not confined to the issue of income tax in the public interest. They went far beyond that, including accusations of fabricating valid sealed court orders that were issued in line with grounds of judgment issued by the court. Regardless of this, the defendants, persisted in republishing the libel to various third parties that, effectively, brought the court proceedings and orders into disrepute. As argued by P/C, the impugned conduct was actuated by pure malice and nothing else, certainly not protection of the public's financial interest. Despite having fully ventilated their grievances in the court and having submitted to the judicial process, the defendants chose to bring to the public realm, matters already decided upon by the court and thereby, violated the sanctity of the judicial process.

[33] DW1, in his evidence, also sought to invoke solicitor-client privilege in regard to the letters that he wrote to his solicitor. This issue can be disposed of summarily from the very fact that though the letters were addressed to the defendants' solicitors,

the same were copied to third parties. As there was publication to the third parties the question of solicitor-client privilege under s. 126, of the Evidence Act 1950 which, under the circumstances had no basis, did not arise at all. Neither was any confidentiality involved as they were open letters that could be read by anyone coming into contact with them. The defence's contention as to the existence of the said privilege was, thus, wholly misconceived. The importance of confidentiality in seeking to invoke the said privilege was explained by VT Singham J, in *Ernest Cheong Yong Yin v. Kamariyah Hamdan & Ors* [2010] 1 LNS 1164; [2011] 10 CLJ 172 where it was held:

> The word 'privilege' used in s. 126 cannot be considered or read in isolation but must necessarily be read together with the word 'confidentiality' as both are interrelated and intertwined. In order for litigation privilege to apply, there must be confidential communication between client and solicitor made for the dominant purpose of the cases in litigation. (See *Lee v. South West Thames Health Authority* [1985] 1 WLR 845 at p. 850.

[34] The learned judge also emphasised the importance of the contents and context of the communication. Where the communication did not entail seeking or giving of legal advice, the said privilege had no application (Dickson, J, in *Solosky v. The Queen* [1980] 1 SCR 521 at p. 837 referred to). In our case, the aforesaid letters written by DW1 did not contain any element of seeking or giving legal advice but only allegations against another solicitor.

[35] For the above reasons, I found that there was a total failure on the defendants' part to establish the defences of fair comment and qualified privilege for the libel that they had widely published. I, therefore, held both the defendants liable to compensate P1 adequately for having seriously defamed him as pleaded.

Damages

[36] Where libel is by publication of defamatory matter in a permanent form which contains *inter alia* words imputing a criminal offence or words calculated to disparage the plaintiff in any office, profession, calling, trade or business it is actionable *per se* without the need to prove actual damage. This is the principle of general damage as stated in the case of *Ratcliffe v. Evans* [1892] 2 QB 524 by Bowen, LJ at p. 528:

> In all such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage.

[37] The letters authored by D1 clearly fit all the essential criteria to constitute liable actionable *per se*. P/C submitted that the general loss of business to P1 resulting from the libel should be considered in assessing damages as the words were in their very nature intended or reasonably likely to produce a general loss of business and that evidence of such general loss was admissible (*Ratcliffe v. Evans (supra)*).

[38] It is important at the outset to state another rule applicable to libel actions, which is very pertinent to the present facts. In *Praed v. Graham* [1889] QBD 53 at p. 55, Lord Esher MR said:

> I desire also to say that in actions of libel there is another rule, which is this: – the jury in assessing damages are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in court during the trial.

[39] Now, PW1 was an advocate and solicitor of some standing and currently in active practice. Among the clients for whom he acted were several major banks, of which he was a panel solicitor. Based on the undisputed evidence, the defendants published the libel to numerous Malaysian banks for whom he acted. PW1 was able to prove through his evidence that remained unchallenged, that defendants' letters to numerous local banks discrediting and scandalising him had in fact affected his professional relationship with several banks whose officers had queried him about the allegation. One bank even raised questions about further dealings with him as a consequence of the libel published. It was beyond doubt that PW1's credibility among his bank clients had been jeopardised and this had caused a direct loss to his income/ earnings.

[40] P/C highlighted a letter dated 22 February 2010 (exh. P50) by the defendants to the Chief Executive Officers of three major banks and a leading insurer which purportedly demonstrated their (defendants') malicious intention to seriously damage and harm PW1's livelihood. As submitted the letter seemed to plainly hint or imply that PW1 should be struck off from the banks'/company's panel of solicitors and was among 'perpetrators' and

'impersonators' who by fraud, connivance, etc would sabotage the financial interests of the government under the ITA. These are indeed wilful and carefully crafted words designed to tarnish PW1's reputation to the maximum. The intention was, as argued, to devastate and ruin not only PW1's practice but his livelihood as well. As conceded by the defendants' then solicitor (PW3) who was called as a plaintiff's witness, he had warned DW1 not to write letters of this nature as it amounted to infringement of a subsisting court order and a penal offence as well. Regardless of the warning, PW1 proceeded with the blatantly unlawful course of conduct and thus, should be made to face the consequences. DW1 further conceded in his own testimony that a person's reputation, including that of himself as a tax consultant, would be worth "hundreds of millions", and that he would sue if it was sullied by libel.

[41] It is trite law that in assessing damages for defamation, the defendant's conduct at the various relevant stages – before and after the impugned act or statement – until culmination of the trial may be taken into consideration. In this case, despite plaintiffs' solicitors issuing a formal demand for retraction of the libel and apology, defendants failed or refused to do so even after an injunction was obtained to restrain them from perpetrating the libel. On the contrary, defendants blatantly disregarded the order as seen in their subsequent conduct, especially that of DW1, without any remorse or regret whatsoever. (See *Praed v. Graham (supra)*). Granted that no amount of apology, retraction or withdrawal can undo the harm or hurt that has been caused but it remains a factor in deciding on the appropriate quantum of damages.

[42] As adverted to earlier DW1 was found guilty of contempt of court for breach of the said injunction and sentenced to a fine of RM80,000 for making defamatory statements by the JB High Court. Despite the conviction, he did not refrain from actively continuing to defame DW1 without compunction. This was fortified by the testimony of PW2, an advocate and solicitor, called as plaintiffs' witness on specific issues between Citibank and D1. PW2 had occasion to meet DW1 at the court corridor on the morning of the trial when DW1 began to slander PW1 by calling him a 'criminal' and a 'liar'.

[43] Like words, especially 'accused criminal', were wantonly used by DW1 against PW1 throughout the proceedings, including in chambers at the case management stage. PW2 also said that there was an attempt by a third party, said to be DW1's friend, to intimidate and discourage him (PW2) from testifying. Similar evidence was given by DW3. Even though these allegations were not proven by calling the third party, DW1 did not deny any of these. In any event, it reflects DW1's state of mind and conduct in this dispute.

[44] PW1 himself explained how the open and direct slander by DW1 during court appearances, on top of the impugned libel, had caused him tremendous "distress and torment". As remarked by PW3, he could not even begin to imagine the distress that the defamatory letters could have caused to PW1. PW3 stressed that he had time and again advised DW1 to refrain from writing and publishing these letters, which also contained allegations against the judiciary. DW1 initially complied with his advice but soon thereafter returned to his old ways. PW3 agreed that the letters contained allegations very disparaging to PW1.

[45] PW1 told the court that throughout the present proceedings DW1 took every opportunity to slander him on unrelated matters whenever his counsel appeared. This was done in public in the presence of lawyers and parties appearing in court for other matters. He was openly and repeatedly called a criminal and one who fabricated court orders. According to PW1, DW1 appeared 'to taunt, harass and bait' PW1 who had to exercise great restraint despite the embarrassment suffered. This evidence spoke for itself from DW1's conduct during the proceedings when at every juncture he threw caution to the wind and freely uttered words highly damaging to PW1.

[46] The principle governing the award of general or compensatory damages for defamation is accurately explained by Pearson LJ in *McCarey v. Associated Newspapers* [1965] 2 QB 86 as follows:

> Compensatory damages ... may include not only actual pecuniary loss and anticipated pecuniary loss or any social disadvantages which result, or may be thought likely to result, from the wrong which has been done. They may also include the natural injury to his (the plaintiff's) feelings – the natural grief and distress which

A he may have felt at having been spoken of in defamatory terms, and if there has been any kind of high-handed, oppressive, insulting or contumelious behavior by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self-confidence, those are proper elements to be taken into account in a case where the damages are at large.

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[47] Apart from the libelous letters pleaded in this claim, from the record, a continuous flow of letters of a similar nature went on for no less than three years regardless of the injunction and the C contempt action. PW1 testified that as a result, he had lost business and work from his clientele. He said that the defendants by their actions had demonstrated a clear intention to adversely affect his earnings.

D **[48]** Having considered the relevant evidence pertaining to the losses and damages that could be reasonably presumed to have been borne by P1 as a result of the aforesaid libel in his capacity as a practising advocate and solicitor, I assessed the fair sum as compensatory or general damages to be RM750,000.

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Aggravated Damages

[49] This category of damages is awarded in cases where the defendant as shown to have intended to aggravate the injury already caused to the plaintiff and has in fact done so by his F conduct pursuant to certain motives. P/C cited the case of *Rookes v. Barnard* [1964] AC 1129 where Lord Devlin held:

> Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation.

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[50] The plaintiff, in asking for aggravated damages, relied on the following items of evidence:

(1) The defendants published the libel to unrelated parties such as CEOs of banks, insurance companies and members of the judiciary;

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(2) Since the original publication, the defendants have republished the libel, and even republished it after issuance of the writ and grant of an interlocutory injunction; A

(3) The defendants have been apprised by their solicitors of the groundlessness of the charges and their groundlessness is self-evident (for instance the charge that the plaintiff had fabricated court orders). PW3 in this connection testified that he had told the second defendant not to write these sort of letters but the second defendant nonetheless persisted in doing so. Regardless, the defendants have continuously repeated the charges. The defendants have also refused to withdraw them and refused to admit to their falsity despite an offer by the plaintiff through his solicitors, if the defendants would withdraw them, the plaintiff would accept apology and nominal damages. B C D

[51] The above matters were established through the evidence of the plaintiff's witnesses, on which they were not cross-examined, and remained uncontradicted.

[52] It was undisputed that apart from the original publication that formed the subject-matter of this claim, the defendants published numerous other defamatory statements/words against P1 in a whole series of correspondences which are on record. The subsequent publication, even after issuance of the writ, can be considered as far as aggravated damages are concerned. This goes to the issue of 'existence of a malicious motive in the mind of the publisher' and 'the spirit and intention of the party publishing their libel' (*Pearson v. Lemaitre* [1843] 5 Man and G 700]. E F

[53] Parties are at liberty to prove or disprove the said motive, intention, etc. In the instant case, the uncontroverted documentary evidence tendered spoke for itself regarding defendants' intentions and motives to inflict maximum damage on P1's reputation despite a court injunction and being properly advised on the unlawfulness of the publications. This was compounded by DW1's conduct throughout the trial in openly slandering P1 without any restraint whatsoever, which is also a factor to be considered in assessing the proper award. G H

[54] P/C asked for an award of RM5 million under this head of damages as being fair under the peculiar circumstances of this case, *inter alia*, the extremely defiant and aggressive conduct of DW1 despite being knowingly in the wrong and putting forth a I

baseless defence. DW1 had no doubt indirectly brought disrepute to the judiciary as well by bringing court proceedings into question through publication of his grievances and allegations against the plaintiffs to numerous unrelated third parties. He had shown blatant disrespect for court orders and decisions as if the defendants need not comply with them by insinuating that judges had been misled by PW1's cheating, forgery, fabrication, etc. This kind of conduct, which was nothing short of a contumelious disregard for the rights of others and disrespect for the sanctity of court proceedings should rightly be deplored and the publisher be made to pay an amount of damages commensurate with his actions. Be that as it may, I did also take into account the fact that D2 had been wound up, leaving D1, who was unrepresented, to solely bear the damages to be awarded, while not discounting the fact that he was the principal actor throughout this case. In the circumstances, I assessed the appropriate award to be RM1,000,000.

Exemplary On Punitive Damages

[55] P/C contended that this was an appropriate case for the above to be awarded based on the general conduct of the defendants right from the beginning which exhibited a "contumelious disregard of the plaintiff's rights" (*McCarey v. Associated Newspapers* [1965] 2 QB 86 referred). While there was no doubt about the said conduct as discussed earlier, a claim for this type of relief was not pleaded. The claim was restricted to general and aggravated damages only. Hence, I declined to make any award under this head.

Decision

[56] The following is in summary form my findings on the issues for determination as outlined.

[57] On liability for defamation by way of libel as pleaded it is plain and clear that the defendants (D1 and D2) made untrue and malicious statements against the 1st plaintiff (P1) *vide* the two letters referred to in the SOC. These letters contain direct label against P1 and were published to third persons. Hence, the elements of defamation by libel are clearly present in this case. The evidence of P1 (PW1) setting out in full the allegations against D1 and D2, especially D2, was unchallenged and therefore, deemed to be accepted.

[58] D1 and D2 did not apologise to P1 or withdraw the defamatory statements despite letters of demand from plaintiffs' solicitors. Further, despite an interlocutory injunction issued by the court, D1 continued to send a whole series of letters containing libellous statements versus P1 to a variety of parties in position without any hesitation or regard for the consequences.

[59] The libel in this case is very serious and blatant without any regard for the law or valid court orders. It is extensive in nature and the damage suffered by P1 would obviously be far-reaching. This is especially so from D2's conduct in labelling P1 a criminal at every opportunity without any justification, including in the court room, in the presence of lawyers, litigants and others.

[60] Defendants raised the defence of fair comment in the public interest. No evidence whatsoever was adduced to prove that the statements were true in fact or in subsistence. Neither were particulars provided in the SOC. The statements are not comments or opinion but pure allegations of fact without any basis. How they could be in the public interest was not shown. Mere statements from D2 himself, an interested party, are not enough. This defence fails.

Damages

General Damages

[61] This is compensatory in nature. It should be based on the presumed losses suffered by P1 as a result of the libel as pleaded. I concluded that a fair and reasonable sum would be RM700,000.

Exemplary Damages

[62] For this, conduct of the defendants after the libel can be taken into account. In view of their blatant disregard for the law and their contumelious conduct, the defendants should be penalised and deterred from continuing their malicious conduct. Their intention to damage P1's livelihood is manifestly clear. I assessed the appropriate sum to be RM1 million.

A **[63]** Interlocutory injunction obtained against the defendants made absolute following my finding on liability based on the uncontradicted evidence that the second defendant had continuously breached the interim injunction.

B **[64]** Judgment entered on prayers (1) – (4) for first plaintiff with interest and costs.

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